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No. 86-1

In the Supreme Court of the United States

OCTOBER TERM, 1986

SUBURBAN O'HARE COMMISSION, ET AL., PETITIONERS

v.

ELIZABETH HANFORD DOLE, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether opponents of an airport renovation project approved by the Federal Aviation Administration (FAA) are entitled to have their factual challenges to the FAA's conclusions adjudicated by a federal district court in a de novo trial.

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OPINIONS BELOW

The petition for certiorari seeks review of two decisions rendered by the court of appeals. The opinion of the court of appeals in No. 85-1073 (Pet. App. A4-A30) is reported at 787 F.2d 186. The memorandum order of the court of appeals in No. 85-1423 (Pet. App. A1-A2) is unreported. The opinion of the district court (Pet. App. A31-A68) is reported at 603 F. Supp. 1013.

JURISDICTION

The judgment of the court of appeals in No. 85-1073 was entered on March 13, 1986. A petition for rehearing was denied on April 3, 1986 (Pet. App. A3). The judgment of the court of appeals in No. 85-1423 was entered on April 14, 1986. The petition for a writ of certiorari was filed on July 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a challenge to the Federal Aviation Administration's (FAA) approval of an Airport Layout Plan [1] describing a $1.5 billion project to renovate and refurbish Chicago O'Hare International Airport, which is owned and operated by the City of Chicago. O'Hare has long been one of the busiest transportation centers in the world, serving the needs of regional, national, and international air commerce. Most of its facilities and runways were completed in the early 1960's, with one additional runway brought into service in 1967 and another in 1971. Originally designed to accommodate 20 to 25 million passengers annually, the airport's three passenger terminals recently have been called upon to handle nearly 40 million passengers a year. Pet. App. A5-A6; 17 R. Final Environmental Impact Statement (FEIS) 3. "Simply stated, O'Hare has grown to the point that demand for gate space and passenger amenities far exceeds the 20-year old facil-

[1] Previous agreements awarding federal aviation funds to O'Hare (see Pet. App. A76-A77) required that any alteration of the airport's existing physical plant first be proposed in the form of an Airport Layout Plan, which is essentially a detailed series of maps indicating the proposed changes, along with supporting documentation.

ities' ability to accommodate it. The airport currently handles twice the passenger volume for which [it] was designed" (*ibid.*).

Today's problems at O'Hare were not unanticipated. In 1975, Chicago began a long-range process designed to produce a plan that would respond to the region's aviation needs for the next two decades. The initial step in this process was the preparation of a Master Plan Study (MPS) by a consulting firm under contract to the City, with funding provided in part by the FAA. In the early stages of the Master Plan process, the City concluded that the projected demands for service at O'Hare could be accommodated only by the construction of two new air carrier runways. MPS IV-1. In 1980, however, the City concluded that this construction was undesirable, and that "constrained" development was preferable, "[b]ased upon considerations such as the level of community concern about the social costs of major expansion and extensive operational and financial analyses * * *." 14 R. 565, 566.

2. While the Master Plan Study was still in the preparation stage, opponents of growth at O'Hare sought relief in the courts. In 1974, the then-Attorney General of Illinois, William Scott, brought an action against the FAA and the Civil Aeronautics Board in which the federal agencies were alleged, among other things, to have violated the National Environmental Policy Act (NEPA) by adopting a policy of unlimited growth at O'Hare. *Illinois ex rel. Scott* v. *Butterfield*, No. 74 C 2440 (N.D. Ill.). Petitioners were permitted to intervene in that action.

The *Butterfield* litigation was settled on October 15, 1982, when the parties and intervenors entered into

a consent decree governing key aspects of future airport development at O'Hare. Pet. App. A109-A117. The decree provided that the City would present the Master Plan projects to the FAA for review "as a single, comprehensive submission." The FAA, in turn, agreed to process an environmental impact statement for those projects. The decree specified which projects would be covered in the City's submission and in the FAA's environmental impact statement. The consent decree also included a general provision that "[a]ll future development at O'Hare will comply with all then applicable requirements of Federal and State of Illinois laws requiring environmental analyses and processing." *Id.* at A110-A112. Finally, the decree provided for continuation of the O'Hare Advisory Committee (OHAC)—an organization whose members include representatives of Chicago's suburban communities—through June 30, 1995, and designated that committee the appropriate forum "for consideration of the relationship between O'Hare and the [plaintiff] communities" (*id.* at A113-A114).[2]

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[2] At the same time that the consent decree was signed, the participants in the *Butterfield* litigation entered into an Intergovernmental Agreement. 2 R. 615-621. That agreement provided that the City would use a specified analytic model in preparing a noise map and that a specified noise level "is a goal toward which the Communities, the People, the FAA and Chicago should aim in carrying out their respective obligations under this Agreement * * *." *Id.* ¶ 1(d). In addition, the agreement provided that "the Communities and Chicago shall take feasible and reasonable steps to discourage the further development of incompatible land uses around O'Hare and to reduce existing incompatible land uses * * *." *Id.* ¶ 3(c). Finally, the agreement acknowledged that Chicago "has no current plans to add new runways to O'Hare suitable

3. After the consent decree was signed in 1982, Chicago continued to refine and revise its plans for the development program. Eventually, the City decided, subject to FAA approval, to undertake a two-stage development of O'Hare's facilities. Phase I of the City's plan, which is not challenged in this litigation, involves the construction of a new terminal and an associated passenger concourse. Phase II is more extensive: it calls for replacement of the old international terminal, construction of new commuter and international terminals and new general aviation and cargo facilities, and minor extensions of two runways. Related projects also are planned, including development of aircraft taxiways, concourse aprons and holding pads; expansion of automobile parking and roadways; and relocation of several other facilities. FEIS 11-18.

In October 1982, the proposed environmental review process for the project was described to the public by the FAA and the City, initially at an OHAC meeting. 19 R. 7573. Shortly thereafter, the City and the FAA jointly held a public meeting to discuss the appropriate scope of the environmental impact statement to be prepared for the project. See 1 R. 49-53, 54-57. Representatives of petitioners attended, as did numerous other organizations and individuals. 1 R. 123, 132-133, 143-147. In addition, petitioners filed four pages of written comments on the proposed scope of the environmental impact statement. 1 R. 173-176. Other parties also supplied written and oral comments as part of the "scoping" process, as did several federal and state agencies. 1 R. 162-195.

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for aircraft classified by the FAA as 'large,' " and provided that Chicago would not bring such new runways into service before June 30, 1995. *Id.* ¶ 4(a).

After reviewing these comments, the City prepared a Preliminary Draft Environmental Impact Statement, which was made available to the public at nearly 30 libraries and other locations. 1 R. 217-220. In addition, public hearings were held on June 1 and June 2, 1983, at different suburban locations. Petitioners were provided with an uninterrupted period at the beginning of each hearing to make comments following the City's description of the plan. After taking into account all of the information available to it, the City put its Airport Layout Plan into final form and submitted it to the FAA for approval.

Upon receiving the Plan, the FAA performed its own assessment of the proposal, reviewing the information supplied by the City and the views received from petitioners and the public. On the basis of that review, the FAA prepared its own draft environmental impact statement, which was circulated for public comment in December 1983. After revising the document in response to the comments received, the agency issued a Final Environmental Impact Statement on May 31, 1984.

The FAA subsequently approved the Airport Layout Plan by a Record of Decision (ROD) issued on November 14, 1984 (Pet. App. A74-A102). The ROD described the scope of the project, potential alternatives, environmental considerations, and other factors. The ROD noted that the FAA had evaluated the proposal under Parts 77, 152 and 157 of the Federal Aviation Regulations (14 C.F.R. Pts. 77, 152, 157), which respectively govern obstruction evaluations for flight operations, the federal airport aid program, and notice requirements for airport construction or modification. Pet. App. A100-A101. The ROD fur-

ther observed that "[a]pproval of the Airport Layout Plan does not represent approval as far as necessity for the development is concerned * * *. It signifies a concurrence for planning purposes based on review of conformance with current standards for safety, utility, and efficiency" (*id.* at A75).

On December 4, 1984, petitioners filed suit in the United States District Court for the Northern District of Illinois, alleging that the approval of the Airport Layout Plan (ALP) violated the *Butterfield* consent decree, NEPA, the Airport and Airway Improvement Act, 49 U.S.C. App. (& Supp. II) 2201 *et seq.*, and the Clean Air Act, 42 U.S.C. (& Supp. II) 7401 *et seq.* The district court did not reach the merits of these claims, however, ruling that review of the FAA's decision was available only in the court of appeals (Pet. App. A31-A68). The district court noted that its decision did not bar petitioners from obtaining judicial review of the FAA's action, because on January 14, 1985, petitioners had filed a petition for review of the FAA's decision in the Seventh Circuit (*id.* at A37).

4. In their petition for review, petitioners alleged an array of factual and legal deficiencies in the ALP approval process and in the associated Final Environmental Impact Statement. These included an asserted failure to give adequate consideration to alternatives to the proposed project (specifically to the options of directing transfer traffic to other airports and of constructing a new airport); failure to analyze the impact of these alternatives; failure to disclose "data, calculations, methodology and worksheets"; failure to identify costs and benefits adequately and to include a cost/benefit analysis; and improper segmentation of the project. Petitioners also contended that the FAA's approval of the ALP violated the agency's regulations

for implementing the Clean Air Act, and violated the Airport and Airway Improvement Act by improperly concluding that the runway extensions shown in the ALP were "minor" rather than "major." Finally, petitioners argued that consideration of these issues required the decision of disputed questions of fact that could only be resolved by the district court.

The court of appeals rejected all of petitioners' claims. The court first determned that it had jurisdiction, concluding that the FAA's decision to approve the ALP was, in substantial part, an "order" made pursuant to Chapter 20, 49 U.S.C. App. (& Supp. II) 1301 *et seq.*, and as such was reviewable only in the courts of appeals as provided in 49 U.S.C. App. 1486. In reaching this conclusion, the court rejected petitioners' contention that approval of the ALP could not be considered an "order" because the administrative record was inadequate to permit judicial review. The court noted that "the existence of a reviewable administrative record is the determinative element in defining an FAA decision as an 'order' for purposes of Section 1486" (Pet. App. A17). Here, the court found the 53-volume administrative record adequate to allow for review. Similarly, the court of appeals found the Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2347(b)—which permits trial de novo in the district court of certain challenges to the decisions of five specifically enumerated agencies—inapposite here because the FAA is not among the agencies enumerated by Congress in the statute.[3] Pet. App. A18.

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[3] The court of appeals also rejected petitioners' assertions (not repeated here) that it lacked jurisdiction because the FAA's decision was made in part under Chapter 31, 49 U.S.C.

The court of appeals then addressed the appropriate standard of review. The court noted that, under Section 1486, the FAA's findings of fact, "if supported by substantial evidence, shall be conclusive" (Pet. App. A18). The court accordingly found the substantial evidence test applicable here. While it recognized "[t]he fact that the agency findings in this case were the product of an informal information-gathering process" (*id.* at A19), the court reasoned:

> The 'informality' of the FAA decisionmaking process is less important to our decision [to apply the substantial evidence standard] than the fact that petitioner's views were represented at virtually every stage of the decisionmaking process. * * * The lengthy and elaborate decisionmaking procedures preceding the FAA's November 14 decision in this case are not the sort of informal processes the drafters of the APA had in mind when they adopted the arbitrary and capricious standard of review.

Id. at A21. The court proceeded to apply this standard, rejecting all of petitioners' substantive contentions (*id.* at A21-A30).[4]

App. (& Supp. II) 2201 *et seq.* (see Pet. App. A15-A16), and that district court jurisdiction to entertain the suit was created by the *Butterfield* consent decree (*id.* at A17).

[4] Petitioners meanwhile had filed an appeal from the district court's December 4, 1984, holding that it lacked jurisdiction to entertain their claims. Shortly after rejecting the petition for review on the merits, the court of appeals summarily affirmed the district court's jurisdictional ruling (Pet. App. A1-A2).

ARGUMENT

Petitioners now make essentially one claim: that they have a right either to a hearing on the record before the FAA or to a trial-type proceeding de novo before a district court in which to contest the agency's factual conclusions. This contention, which cannot be reconciled with the decisions of this Court and of the courts of appeals, is wholly without merit and does not warrant further review.

1. As the court of appeals noted, the challenged FAA action was composed of four elements. Three of those elements were undertaken pursuant to Chapter 20 of the Federal Aviation Act; Section 1486 of that Act specifies that decisions rendered under Chapter 20 are reviewable in the court of appeals under a substantial evidence standard. The fourth element of the FAA's decision was rendered under Chapter 31. See Pet. App. A14-A16. While the Act does not specifically address judicial review of agency action taken under that Chapter, such decisions are reviewable under the Administrative Procedure Act (APA), 5 U.S.C. 704.

Thus, review was had here under the combined auspices of the Federal Aviation Act and the APA. Neither Act expressly requires use of an on-the-record trial-type proceeding in the context of an informal adjudication such as that conducted in this case by the FAA.[5] The Federal Aviation Act nowhere refers to such proceedings, and the APA requires them only where the underlying statute directs the agency to

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[5] The right to a trial-type hearing is generally denoted by Congress's inclusion in a statute of the words "hearing on the record." See *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

conduct a formal adjudication "on the record after opportunity for an agency hearing." 5 U.S.C. 554(a). The relevant portions of the Federal Aviation Act contain no such language.[6]

2. Petitioners evidently recognize that the applicable statutory provisions do not expressly call for an on-the-record proceeding before the agency, and acknowledge that the courts lack the authority to require the FAA to hold such proceedings (Pet. 28, citing *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)). Petitioners nevertheless assert (Pet. 27) that the court of appeals should have eschewed jurisdiction—in disregard of the express language of the Federal Aviation Act—and instead remanded the matter to the district court for a trial de novo. Petitioners base this argument on their view that "the Court of Appeals attempted to honor the letter of the

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[6] Petitioners do not appear to contend that a trial-type proceeding is constitutionally required under the Due Process Clause. To the extent that such an argument is advanced in the petition, however, it is without merit. While due process requirements are triggered only where a "liberty" or "property" interest is implicated (see *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972)), "[g]eneralized health, safety, and environmental concerns do not constitute liberty or property subject to due process protection." *City of West Chicago* v. *Nuclear Regulatory Commission*, 701 F.2d 632, 645 (7th Cir. 1983); see *Izaak Walton League* v. *Marsh*, 655 F.2d 346, 361 (D.C. Cir. 1981), cert. denied, 454 U.S. 1092 (1982). See also *Bi-Metalic Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915). Moreover, it is clear that, in the context of congressionally created "public rights," Congress enjoys great latitude both in establishing agency factfinding mechanisms and in providing for judicial review of agency decisions. Cf. *Atlas Roofing Co.* v. *Occupational Safety & Health Commission*, 430 U.S. 442, 450-456 (1977).

statutory command without honoring the corollary requirement that the substantial evidence test [whose use is mandated by the Federal Aviation Act] only be applied where there has been an agency trial below" (Pet. 27).

Petitioners, however, are fundamentally mistaken in asserting that there is, as a general matter, any such "corollary requirement" of a de novo proceeding before a district court when the agency has not previously conducted an on-the-record hearing. In support of their contention, petitioners cite (Pet. 20-21) isolated portions of the APA's legislative history (and cite nothing at all from the background of the Federal Aviation Act).[7] But the text of the APA as en-

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[7] Petitioners' analysis of the APA's legislative history is flawed. As explained in the *Attorney General's Manual on the Administrative Procedure Act* 109 (1947):

> As to Clause (6) [now paragraph (F) of 5 U.S.C. 706(2)], the legislative history has resulted in misunderstanding. As S. 7 was introduced in the Senate, clause (6) was followed by a provision that "The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing." When S. 7 was reported by the Senate Committee, the quoted provision was omitted. Notwithstanding, the subsequent legislative history contains repeated statements to the effect that clause (6) embodies the "established rule * * * [which requires a judicial] trial de novo to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing." Senate Comparative Print, June 1945, p. 20 (Sen. Doc. pp. 39-40); H.R. Rep. p. 45 (Sen. Doc. p. 279).
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> To the contrary, the language of clause (6), "to the extent that facts are subject to trial de novo by the reviewing court," obviously refers only to those existing situa-

acted contains no such requirement of a de novo trial.[8]

That this omission was not an oversight is confirmed by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). That case involved a challenge to an agency's approval of the commencement and funding of a construction project. As here, no relevant statute expressly required the agency to make "formal findings" as part of its decision (*id.* at 409, 417; see also *Camp* v. *Pitts*, 411 U.S. 138, 140 (1973); *National Coal Operators Ass'n* v. *Kleppe*, 423 U.S. 388, 388-399 (1976)). As here, no relevant statute required an adjudicatory hearing "to produce a record that is the basis for agency action" (401 U.S. at 415). In these circumstances, this Court held that the agency decision was not subject to review by de novo trial; it explained that de novo review is available only where factfinding procedures are inadequate (and that there may be independent judicial factfinding where issues that were not before the agency are raised in judicial proceedings to enforce nonadjudicatory agency action). *Ibid.*; see *Camp*, 411 U.S. at 141-142. As in *Overton Park*, neither of these prerequisites to de novo review is present here.

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tions in which judicial review has consisted of a trial de novo. * * * In addition, there is no "established rule" requiring a judicial trial de novo wherever statutes fail to require an agency hearing.

[8] Indeed, the APA's judicial review provision, 5 U.S.C. 706(2)(F) (emphasis added), simply provides that the reviewing court shall set aside agency action "unwarranted by the facts *to the extent that* the facts are subject to trial de novo by the reviewing court." Thus, it is implicit in the APA that de novo review is available only if a de novo trial is *otherwise* required by applicable law.

Nor can petitioners derive from the inclusion of the term "substantial evidence" in Section 1486 a requirement that judicial review proceed de novo in the district court unless the agency previously has conducted on-the-record proceedings. Petitioners cite nothing from the legislative history of the Act supporting such a contention. Instead, petitioners attempt to demonstrate that Congress invariably correlated use of the substantial evidence standard of review by a court with a prior trial-type hearing before the agency. To this end, petitioners devote the major portion of their argument (see Pet. 18-23) to a discussion of what they term the "five basic frameworks" for judicial review of agency action involving disputed facts.

Petitioners' contention, however, rests on a non sequitur.[9] While Congress in some circumstances may have linked judicial review under a "substantial evidence" standard to the prior conduct by the agency of a trial-type hearing on-the-record, it has not invariably done so,[10] and petitioners have pointed to nothing in the Federal Aviation Act to suggest that

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[9] As the district court noted, petitioners' argument "inevitably leads to the conclusion that any time a party merely alleges that the agency's administrative record is insufficient, or that it is based on disputed fact issues, a special judicial review statute that vests exclusive jurisdiction in the Court of Appeals is immediately set aside in favor of jurisdiction in the district court" (Pet. App. A68).

[10] In a variety of statutes (*e.g.*, Consumer Product Safety Act, 15 U.S.C. 2060(c); Toxic Substances Control Act, 15 U.S.C. 2618(c)(1)(B); Occupational Safety and Health Act, 29 U.S.C. 655(j)), Congress has provided for review of rulemaking under a "substantial evidence" standard while failing to require that an agency conduct a formal hearing as part of its rulemaking process.

Congress created such a nexus here. To the contrary, Congress clearly indicated that review was to occur in the courts of appeals, and neither stated nor implied that such review was contingent upon the agency's prior conduct of an on-the-record hearing.

In any event, even if use of the "substantial evidence" standard is inextricably linked to the prior holding of an on-the-record hearing by the agency, that conclusion would suggest only that the court below should have employed the "arbitrary and capricious" standard in reviewing the FAA's decision—not that the court of appeals should have transferred the case to the district court. As the court below explained, petitioners' challenge does not fall within the narrow category of cases that may be sent to the district courts pursuant to the Hobbs Act. In the absence of such a statutory directive, the " 'focal point for judicial review should be the administrative record already in existence, not some new record made inititially in the reviewing court.' " *Florida Power & Light Co.* v. *Lorion*, No. 83-703 (Mar. 20, 1985), slip op. 14 (citation omitted). The court of appeals thus acted properly in considering the case on the record compiled by the FAA. And if the court erred in applying the ostensibly stricter substantial evidence test,[11] rather than the arbitrary and capricious

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[11] A number of courts, including the Seventh Circuit, have questioned whether there is any meaningful distinction between the two standards where, as here, informal agency action is under review. See, *e.g.*, *River Road Alliance, Inc.* v. *Corps of Engineers*, 764 F.2d 445, 449 (7th Cir. 1985), cert. denied, No. 85-785 (Mar. 3, 1986); *Aircraft Owners & Pilots Ass'n* v. *FAA*, 600 F.2d 965, 971 (D.C. Cir. 1979); *Associated Industries* v. *Department of Labor*, 487 F.2d 342, 349-350 (2d Cir. 1973), cert. denied, 416 U.S. 942 (1974); *Paccar*,

standard, that error plainly did not prejudice petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Inc. v. *National Highway Transportation Safety Administration*, 573 F.2d 632, 636 (9th Cir. 1978), cert. denied, 439 U.S. 862 (1979).

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